

Nguyen (Migration) [2021] AATA 1113 (21 January 2021)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mrs Thi Kim Loan Nguyen
CASE NUMBER:	1802150
HOME AFFAIRS REFERENCE(S):	BCC2016/1726321
MEMBER:	Hugh Sanderson
DATE:	21 January 2021
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl.820.211 of Schedule 2 to the Regulations; and • cl.820.221 of Schedule 2 to the Regulations.

Statement made on 21 January 2021 at 2:06pm

CATCHWORDS

MIGRATION –Partner (Temporary) (Class UK) visa – Subclass 820 –long-term genuine relationship – parties were legally married – genuine married relationship at the time of application –consistent evidence –decision under review remitted

LEGISLATION

Migration Act 1958, ss 5F, 65

Migration Regulations 1994, r 1.15, Schedule 2, cls 820.211, 820.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 13 May 2016 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2) because the delegate was not satisfied the applicant was the spouse, as defined in s.5F of the Act, of the sponsoring partner.

Background

4. The applicant is a citizen of Vietnam and is currently 31 years of age. She first entered Australia in June 2014 holding a Student visa. The only time she has left Australia was in March 2016 when she returned to Vietnam for 16 days. The sponsor of the applicant is Minh Hung Le. He was born in Vietnam and is currently 36 years old. He is an Australian citizen.
5. The sponsor was previously married to Giang Tran who he married on 10 March 2008. The sponsor sponsored Ms Tran for a Partner visa. She was granted a Subclass 309 Partner (Temporary) visa on 8 May 2009. She was subsequently granted a Subclass 100 Partner (Residence) visa on 15 June 2011. The sponsor divorced Ms Tran on 16 February 2014.
6. The sponsor's movement records show that he has travelled overseas as follows:
 - From 15 May 2015 to 28 May 2015;
 - From 21 March 2016 to 6 April 2016 (travelling with the applicant); and
 - From 27 October 2018 to 2 November 2018.
7. When the application for the Partner visa was made, inconsistent information was made in relation to the sponsor's relationship with Ms Tran. At one point it was stated that there was a child of his relationship with Ms Tran and at another point it was stated there were no children of the relationship the sponsor had with Ms Tran.
8. The applicant provided information stating that the sponsor had a child, Oscar, who was born on 9 September 2012. The mother of the sponsor's child was the sponsor's ex-girlfriend, Julie Le, and not his former wife. It was claimed that the sponsor had a brief relationship with Ms Le. Oscar was now living with her, but he had contact with the sponsor on weekends.
9. The parties claimed they first met each other at friend's party on 1 February 2015. They claim a relationship developed and they were married on 7 February 2016. A copy of the marriage certificate has been provided to the Department. The parties travelled to Vietnam together and conducted a further wedding ceremony in April 2016. It was claimed the parties were living together in the home of the sponsor's parents.

10. The parties provided various documents in support of the application. This included the following:

- Correspondence addressed to the parties at the home they claimed to be living together;
- Joint bank account statement;
- Photos of the parties together on various social occasions;
- Statements from the applicant and the sponsor;
- Statements from friends of the parties;
- Receipts for the purchase of goods in Australia and Vietnam;
- Invitations to the parties to social events;
- Cards and other letters addressed to the parties congratulating them on their relationship; and
- Evidence of joint travel together to Vietnam.

11. The delegate to consider the application noted the following:

- The joint bank account statements did not indicate that the parties were pooling their financial resources or had shared expenses;
- Although the parties had correspondence addressed to them at the home they claimed to share, there was no evidence of any shared utilities or any other accounts for the parties in their joint names at that address;
- The statements by friends and the photos provided did not provide convincing information as to the social aspects of the relationship;
- There was little information of any long-term commitment to a relationship; and
- The inconsistent information as to the sponsor's child, Oscar, raised questions as to whether the parties were in a genuine relationship and the credibility of the information provided in support of the application.

12. Taking these matters into account, the delegate was not satisfied the applicant was the spouse, as defined in s.5F of the Act, of the sponsoring partner. The delegate found the applicant did not meet the criteria in cl.820.211(2) and refused the application.

Information to the Tribunal

13. The applicant provided further information to the Tribunal including the following:

- Residential tenancy agreements in the names of the parties;
- Joint bank statements including a term deposit;
- Superannuation fund details of the parties;

- Tax returns;
 - Health insurance details; and
 - Statements from the parties and friends and family members in support of the application.
14. The applicant provided the birth certificate of Oscar. This showed that Oscar was born on 9 September 2013 and that at that time the sponsor was living in a different residence to that of Oscar's mother.
 15. The applicant appeared before the Tribunal on 21 January 2021 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages. The applicant was represented in relation to the review by her registered migration agent who did not attend the hearing.
 16. The parties provided consistent information as to various aspects of their relationship. That included where they were living, their work, their social activities and their financial arrangements. They provided consistent information about the arrangements for the sponsor's son, Oscar, and the details of the sponsor's relationship with Oscar's mother. Both parties presented their evidence in a straightforward and credible manner.
 17. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

18. The issue in the present case is whether the applicant is the spouse, as defined in s.5F of the Act, of the sponsoring partner.

Whether the parties are in a spouse or de facto relationship

19. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
20. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

21. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The parties were married on 7 February 2016. There is

nothing to indicate the marriage between the parties is not valid. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

Financial aspects

22. Neither the applicant nor the sponsor has any significant assets of their own and it is not surprising, therefore, that they do not jointly own any significant assets. They have a joint term deposit and a motor vehicle. Apart from that they do not have any other significant assets or liabilities. They are the joint tenants of the home unit they are living in. They share the shopping which is paid for out of their joint bank account. The applicant's income is deposited into the joint account. When the sponsor was working, he had an account in his sole name into which his pay was deposited and he would regularly transfer money to their joint account. The sponsor is now in receipt of jobseeker allowance and that money is deposited into the joint bank account.
23. The Tribunal is satisfied the financial aspects of the relationship indicate the parties are pooling their financial resources and sharing the day-to-day household expenses. The Tribunal is satisfied the financial aspects of the relationship are indicative of the parties living together in a genuine and continuing relationship and with a mutual commitment to a shared life as husband and wife to the exclusion of all others.

Household

24. The parties were living together in the home of the sponsor's parents. They are now renting a unit where they live together. The sponsor has contact with his son, Oscar, every Sunday with Oscar returning to his mother on Monday. The applicant is involved in the care of Oscar and has been involved in his life. She is aware of the history of the relationship the sponsor had with Oscar's mother.
25. The parties have been sharing the housework and, as the sponsor's profession is a chef, the cooking and other domestic chores. The parties provided consistent information as to the arrangements within their household. The Tribunal is satisfied that the parties are living together and that the arrangements within the household indicate they have a mutual commitment to a shared life as husband and wife to the exclusion of all others and that their relationship is genuine and continuing.

Social aspects

26. The parties have provided numerous photos of themselves together attending various social functions with friends and family members. The parties continue to have regular contact with the sponsor's family and regularly have meals with them. The applicant continues to have regular contact with her family and the sponsor is involved in talking to the applicant's family when they call each other. The parties celebrated their marriage both in Australia and in Vietnam allowing as many family members to attend.
27. The Tribunal is satisfied that the parties represent themselves as being married to each other and that their friends and family recognise their relationship is genuine. They have undertaken various social activities together and will continue to do so in the future. The social aspects of the relationship support a finding that the parties are in a genuine and continuing relationship.

Commitment

28. The parties first met each other in February 2015 and their relationship started after that time. They were married on 7 February 2016 in Australia and then travelled to Vietnam to have a similar celebration with the applicant's family in Vietnam. They have now been married for almost four years and have been living together over that time.
29. Over the course of their relationship the parties have had to overcome various problems and difficulties. This includes periods when the sponsor has lost his job as a chef due to the slowdown in the entertainment industry. The parties have managed to save some money in a term deposit which they plan to use in the future to purchase a home. They provided consistent information as to their plans to have a family together.
30. The Tribunal is satisfied that the parties provide each other the degree of companionship and emotional support which would be expected in a genuine and continuing relationship. They have plans for their future together which indicate they see their relationship as long-term.

Other considerations

31. The sponsor was previously married and sponsored his first wife on a Partner visa. This was granted to her in June 2011. It appears that soon after this their relationship deteriorated and they eventually separated. Although having lived separately and apart from each other since late 2011, the sponsor did not divorce his first wife until 2014. The sponsor believes his first wife has remarried to an Australian citizen and that they have children together. He does not have any continuing contact with his first wife.
32. The sponsor commenced a relationship with a woman who he had known since his school days. They never lived together although they had a sexual relationship and, as a result, their child, Oscar, was born in September 2012. The birth certificate of Oscar states that the sponsor and Oscar's mother were not living together at the time of his birth. The relationship the sponsor did have with Oscar's mother did not continue. Although their relationship as mother and father of Oscar continues, and will do so for the rest of their lives, he does not have any continuing intimate relationship with Oscar's mother. The sponsor, with the help of the applicant, have maintained a good working relationship with Oscar's mother so that appropriate arrangements have been made for Oscar's care and support and to enable him to have a continuing relationship with the sponsor.
33. The Tribunal has considered all the circumstances of the applicant and the sponsor both individually and cumulatively. The Tribunal is satisfied the weight of evidence supports a finding that the parties are living together in a genuine and continuing relationship and have a mutual commitment to a shared life as husband and wife to the exclusion of all others. The Tribunal is satisfied that the parties' relationship was genuine at the time of the application and continues to be genuine and continuing at the time of this decision.
34. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision.
35. At the time of the application the applicant was sponsored by the sponsor who is her spouse and was, at that time, over the age of 18. Therefore, the applicant meets the criteria in cl.820.211(2)(c). She continues to be sponsored by the sponsor.
36. At the time of the application, the applicant held a substantive visa and the provisions of cl.820.211(2)(d) are not relevant. As the applicant meets the criteria in cl.820.211(2) the applicant meets the criteria cl.820.211.

37. Accordingly, the Tribunal finds the applicant meets cl.820.211 and cl.820.221.
38. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

39. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
 - cl.820.211 of Schedule 2 to the Regulations; and
 - cl.820.221 of Schedule 2 to the Regulations.

Hugh Sanderson
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).